



Clause 4.6 Variation Request Edinglassie Village Residential Care Facility – SEPP (Housing for Seniors or People with a Disability) 2004 - Clause 40(4)(a)

1-11 Emerald Street and 6-8 Troy Street, Emu Plains

Submitted to Penrith City Council
on behalf of Uniting

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This document is preliminary unless approved by a Director of City Plan Strategy & Development

CERTIFICATION

This report has been authorised by City Plan Strategy & Development, with input from a number of other expert consultants, on behalf of the Client. The accuracy of the information contained herein is to the best of our knowledge not false or misleading. The comments have been based upon information and facts that were correct at the time of writing this report.

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Table of Contents

1. Introduction	4
2. Extent of variation	5
3. Compliance with the development standard is unreasonable or unnecessary in the circumstances of this case. [cl. 4.6(3)(a)]	6
4. There are sufficient environmental planning grounds to justify contravening the standard. [cl. 4.6(3)(b)].....	12
5. The proposal will be in the public interest because it is consistent with the objectives of the standard and the objectives of the zone. [cl. 4.6(4)(a)(ii)].....	14
6. Contravention of the development standard does not raise any matter of significance for State or regional environmental planning. [cl. 4.6(5)(a)]	16
7. There is no public benefit of maintaining the standard [cl. 4.6(5)(b)]	17
8. Conclusion.....	18

1. Introduction

This Clause 4.6 variation request accompanies a Development Application (DA) submitted to Penrith City Council for demolition of structures and the construction of a three storey Residential Care Facility (RACF) at 1-11 Emerald Street and 6-8 Troy Street, Emu Plains.

The Environmental Planning Instrument (EPI) to which this variation relates is the State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (Seniors SEPP). The exception is sought via a Clause 4.6 variation in relation to Clause 40(4)(a) of the Seniors SEPP. The numeric value of Clause 40(4)(a) 'Height in zones where residential flat buildings are not permitted' development standard is 8 metres. The zoning of the land is R3 Medium Density Residential under the PLEP and Residential Flat Buildings are not permitted in the zone. The Seniors SEPP defines height as the distance measured vertically from any point on the ceiling of the topmost floor of the building to the ground level immediately below that point.

This request has been prepared in accordance with the Department of Planning & Environment (DP&E) Guideline Varying Development Standards: A Guide, August 2011, and has incorporated as relevant principles identifies in the following judgements:

1. *Winten Property Group Limited v North Sydney Council [2001] NSWLEC 46*
2. *Wehbe v Pittwater Council [2007] NSWLEC 827*
3. *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009 ('Four2Five No 1')*
4. *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90*
5. *Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 ('Four2Five No 3')*
6. *Moskovich v Waverley Council [2016] NSWLEC 1015*

In this report, we have explained how flexibility is justified in this case in terms of the matters explicitly required by Clause 4.6 to be addressed in a written request from the Applicant. This report also addresses, where relevant and helpful, additional matters that the consent authority is required to be satisfied of when exercising either the discretion afforded by Clause 4.6 and the assumed concurrence of the Secretary.

2. Extent of variation

The numerical value of Clause 40(4)(a) 'Height in zones where residential flat buildings are not permitted' development standard is 8m. The Seniors SEPP defines height as the distance measured vertically from any point on the ceiling of the topmost floor of the building to the ground level immediately below that point.

The maximum variation requested is 2.66m. As shown on DA Drawing No. DA201 'True South Elevation', the variation is a result of a 1.8m variation above the nominated 8m height standard, in addition to 0.866m variation when measured from ground level (existing). In this regard, 32% of the variation is a result of the natural contouring of a small section of the site. The scope of the variation is shown in Figure 1 below.

We note that the ground level changes across the site and as such the elevations have been produced using accurate RL data based on the site survey to demonstrate the extent of the variation.

In addition, the DA Drawing No. DA201 'True South Elevation' illustrates that the roof is 11.4m and the lift overrun is 13.5m. This has been provided for information purposes only. The measurements do not relate to the overall calculation of the variation, as in accordance with the Seniors SEPP height is defined as the distance measured vertically from any point on the ceiling of the topmost floor of the building to the ground level immediately below that point.

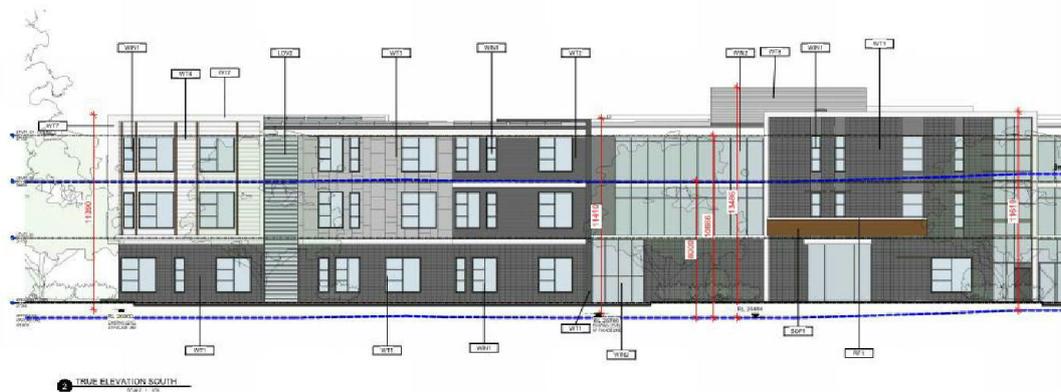


Figure 1: Extract of east elevation indicating the maximum height non-compliance shown in red (Source: MDS Architects)

3. Compliance with the development standard is unreasonable or unnecessary in the circumstances of this case. [cl. 4.6(3)(a)]

Achieves the objectives of the standard

Compliance with in Clause 40(4)(a) 'Height in zones where residential flat buildings are not permitted' development standard is unreasonable or unnecessary in the circumstances of this case because, as explained in Table 1 (below), the objectives of the development standard are achieved, notwithstanding non-compliance with the standard¹.

The Seniors SEPP provides no instruction on the intent of the height controls in Clause 40(4)(a) and does not otherwise nominate any objectives to underpin the intent of the various height controls. It is therefore necessary to assume what the purpose of the standard might be, and then to evaluate whether a variation to the control would be consistent with these objectives.

Table 1 - Achievement of Development Standard Objectives

Objective	Discussion
<p>To ensure that the development does not dominate the streetscape by virtue of its scale and bulk and is consistent with the character of the area;</p>	<ul style="list-style-type: none"> ▪ The built form is visually broken up so that it does not appear as one building from key aspects. The different sections of the building are setback between 6-60m and are separated by generous breaks and landscaping. In addition, the proposal will maintain consistency with the street context and streetscape character by retaining the existing minimum 6m street/front setbacks and increasing the eastern setback to enhance views to (the Uniting Church Heritage Item. ▪ The building is articulated and provides a number of indentations, including a central courtyard within the northern facade. Further use of a variety of building materials, colours and finishes will divide the building mass and reduce the bulk and scale of the building. Overall, this will minimise visual impact of the development to the surrounding area and the development will contribute positively to the desired contextual character. ▪ The majority of existing significant vegetation has been retained (approximately 91% of trees) and referenced to establish building heights and provide screening. The retained trees, particularly those located in the north-east section of the site, will serve to soften the bulk and scale of the

¹ In *Wehbe v Pittwater Council* [2007] NSWLEC 827 Preston CJ identified 5 ways in which an applicant might establish that compliance with a development standard is unreasonable or unnecessary and that it is sufficient for only one of these ways to be established. Although the decision concerned SEPP 1, it remains relevant to requests under clause 4.6 as confirmed by Pain J in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, notwithstanding that if the first and most commonly applied way is used, it must also be considered in 4.6(4)(a)(ii). The 5 ways in *Wehbe* are: 1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard; 2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary; 3. The objective would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable; 4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence the standard is unreasonable and unnecessary; or 5. The zoning of the land is unreasonable or inappropriate.

proposed built form when viewed from the Great Western Highway. In addition, additional landscaping proposed along the northern façade will assist to soften the view of the development, thereby ensuring the development will not have a significant impact on the amenity of the locality.

- The varied building alignment along the northern and eastern façade effectively serves to break up the bulk, define the street edge and contribute to the landscape setting of buildings. The inclusion of a courtyard between the east and west wings of the building also serves to break up the building bulk, thereby ensuring the building does not dominate the streetscape.
- Extensive building setbacks (13.6m to 23.7m) have been provided to Emerald Street to retain visual relationships between the proposed development and the adjoining heritage item, retain existing vegetation and to provide suitable setbacks from residential properties along Emerald Street to reduce visual impact. In this regard, the nearest residential development is located approximately 36m from the site boundary.
- The proposed building has been setback over 13.6m from Emerald Street, thereby ensuring views south from the Great Western Highway to the Uniting Church are maintained and enhanced.
- The existing fellowship centre is currently located approximately 2.5m from the southern façade of the heritage item and does little to improve the curtilage of the item. In comparison, the proposal seeks to demolish the fellowship centre and set the proposed building back by 6.7m, thereby ensuring the development provides an appropriate visual relationship.
- Visually, the height difference between the existing chapel and proposed building will be mediated by the re-planting of the large deciduous trees which historically grew to the northwest of the chapel. The relationship between the church building and tree, which dominated the Emerald Streetscape in early photographs will be re-established.
- The proposed eastern façade adopts suitable materials, finishes as well as articulation throughout its elevations to achieve appropriate presentation to both the adjoining public and private domains.
- Additional perimeter plantings will be provided to soften any potential visual impact.
- Taller building elements such as lift shafts are located in the centre of the development to minimise impact on neighbouring residential

	development, maximise setbacks and minimising overshadowing and privacy impacts.
To ensure compatibility with the streetscape and site context; and	<p>The subject site is within an established urban area with a streetscape and context defined by the following attributes:</p> <ul style="list-style-type: none"> ▪ The subject site provides a 200m frontage to the Great Western Highway and 127m to Emerald Street. The site currently accommodates an extensive medium density retirement village containing residential care facilities, a hostel and self-contained dwellings. In this regard, the existing medium density development is one of the prominent features of the streetscape; ▪ The site is located directly opposite a school to the south (potential height limit under the Schools SEPP of 22m) and a large shopping complex to the north (15m height limit); ▪ To the east and west are 1-2 storey residential dwellings zoned as R3 Medium Density Residential; ▪ The site is also located on the Great Western Highway, which has a road reserve in excess of 40m. <p>In light of the above, the streetscape can be viewed as a mixture of medium density and low density residential dwellings, institutional buildings and commercial development. When understood within this context, the proposed increase in building height is not considered to result in a development that is incompatible with the streetscape and site context.</p> <p>In addition, further justification in relation to compatibility with the streetscape is provided as follows:</p> <ul style="list-style-type: none"> ▪ The built form is visually broken up so that it does not appear as one building from key aspects. The different sections of the building are separated by generous breaks and landscaping; ▪ The design largely preserves existing site characteristics, including vegetation and topography, which assist in reducing the visual dominance of development; ▪ The proposed built form and materials have been chosen with care and sensitivity to the site context; ▪ The architectural elements along the eastern façade break up the overall massing and impart a sense of human habitation in a “residence” as opposed to “institution”; ▪ The proposed 6m-41m setback to the Great Western Highway is consistent with the

	<p>surrounding pattern of development and reduces the perception of height;</p> <ul style="list-style-type: none"> ▪ The generous setbacks along eastern boundary reduce the perception of height.
<p>To not cause unreasonable amenity impacts on adjoining developments.</p>	<p>There are various potential impacts that are associated with increased height and the amenity to adjoining properties. These are discussed separately below.</p> <p>Solar Access and Overshadowing</p> <p>The envelope of the building has been designed and sited to ensure no undue overshadowing will occur to the public domain or to any neighbouring buildings. Shadows from the proposal are contained within the property. Consequently, the proposed development does not create any additional overshadowing to impact adjoining properties.</p> <p>Privacy</p> <p>The proposal does not result in any parts of the building above the height standard that would result in any loss of privacy or overlooking to adjoining properties. The siting and placement of buildings optimises the separation of buildings within the site and on adjoining land. Specifically, the following building separation distances are provided:</p> <ul style="list-style-type: none"> ▪ Approximately 36m between the building and the residential development located to the east along Emerald Street; ▪ Approximately 74m between the building and the Lennox Village Shopping Centre located to the north; and ▪ Approximately 82m between the building and the school located to the south. <p>Visual privacy is further achieved through suitable screening devices and landscape plantings to provide screening.</p> <p>Acoustic</p> <p>There are no areas of the building above the height standard that would result in any acoustic impact to surrounding properties. The breach of the standard will not result in any acoustic impacts to surrounding properties.</p> <p>Views</p> <p>There are no significant views in the surrounding area. The proposed breach of the standard will not result in the loss of any views from surrounding properties.</p> <p>Bulk and scale</p>

The proposal has been designed to ensure that the development is not visually dominant as viewed from the street and surrounding properties. The bulk of the development has been minimised through the varied building alignment along the northern and eastern façade, internal courtyard and retained vegetation. The taller parts of the building such as the lift over-run are located centrally on the roof and are not highly visible from the surrounding area. The bulk and scale of the building will be consistent with the bulk and scale of the existing development on the site. The materials and colours are considered to be respectful and sensitive to the surrounding area.

In addition to the above assumed objectives, the proposed variation should also be considered as to whether it is consistent with the SEPP Seniors aims/objectives pursuant to Clause 2(1) - Aims of the Policy, which are outlined below:

“This Policy aims to encourage the provision of housing (including residential care facilities) that will:

- (a) increase the supply and diversity of residences that meet the needs of seniors or people with a disability, and*
- (b) make efficient use of existing infrastructure and services, and*
- (c) be of good design Response”*

The proposal is consistent with and achieves the aims of the policy as outlined in Table 2 (below):

Figure 2 Achievement of SEPP Seniors Clause 2(1) - Aims of the Policy

Objective	Discussion
(a) increase the supply and diversity of residences that meet the needs of seniors or people with a disability;	The proposed development will promote the social and economic welfare of the local community through the provision of seniors housing that complies with all relevant standards relating to facilities and accessibility for the aged and disabled people.
(b) make efficient use of existing infrastructure and services, and	The existing facility is provided with all the utility services to support seniors housing. This application seeks to provide beds within the existing facility, which directly achieves the aims under Clause 2(1)(a) and (b). The additional demands associated with the extra accommodation are not expected to be beyond the capacity of the existing utility services, which will be augmented as necessary to meet the requirements of relevant service providers.
(c) be of good design response	There will be no unreasonable adverse impacts on the environment. The Design Statement prepared by MDP Architects in support of this development application demonstrate that the development provides a well



considered design response that meets the needs of seniors and people with disabilities.

Further to the above, the proposal is considered to be consistent with the principles outlined in PC No 5 (Wombarra) Pty Ltd v Wollongong City Council [2003] NSWLEC 268 based on the following:

- The built form is visually broken up so that it does not appear as one building from key aspects. The different sections of the building are separated by generous breaks and landscaping;
- The design largely preserves existing site characteristics, including vegetation and topography, which assist in reducing the visual dominance of development;
- The proposed built form and materials have been chosen with care and sensitivity to the site context; and
- The design is considered to be compatible with the streetscape.

4. There are sufficient environmental planning grounds to justify contravening the standard. [cl. 4.6(3)(b)]

The SEE prepared for this DA provides a holistic environmental planning assessment of the proposed development and concludes that subject to adopting a range of reasonable mitigation measures, there are sufficient environmental planning grounds to support the development. In particular, the SEE has demonstrated that the proposal is substantially compliant with the relevant environmental planning framework. Therefore, it can be concluded that the proposal does not result in any unreasonable environmental impacts.

Additional specific environmental grounds to justify the breach of the standard are summarised as follows:

- A compliant development could be achieved on site through provision of a larger building footprint and significantly reduced setbacks to the eastern boundary. This however would require more extensive tree removal and lead to increased impacts on adjoining residences and the Uniting Church Heritage Item. In comparison, the proposed noncompliance enables an extensive building setback along Emerald Street (13.6m to 23.7m) and the Great Western Highway (6m to 41m). Consequently, the proposed non-compliance effectively provides for:
 - Increased retention of vegetation along the sites eastern frontage;
 - Increased setbacks and privacy for adjoining residential development;
 - An enhanced view corridor to the existing Uniting Church Heritage Item from the Great Western Highway; and
 - Increased building setbacks to the Uniting Church Heritage Item and an improved landscaped curtilage.

It follows that the proposed breach of the height standard provides for an improved response to the site's existing natural and built environment.

- Given the extensive scale of the existing RACF, it is considered that the existing development forms its own character, which is not that of a low density residential development. Rather, the existing development has the character of a medium density residential development as envisaged by the objectives of the R3 Medium Density zone.
- The site is effectively bookended by the Lennox Village Shopping to the north and the school to the south. The Lennox Village Shopping Centre has a 15m height limit and the school to the south also has a height limit of 22m in accordance with the SEPP (Educational Establishment and Child Care Facilities). The site is also surrounded by mature vegetation up to 20m in height as depicted on the urban height and significant tree context analysis Plan DA062 at **Appendix 2**. It follows that the breach of the standard allows for a development that is contextually appropriate and not inconsistent with the existing and desired future character of the area.
- The proposed contravention of the development standard will not lead to any loss of views or overshadowing of adjoining properties over and above that associated with a compliant development.

In addition to the above, Uniting have advised the following in relation to the specific environmental grounds that further justify the breach of the standard:

- The proposed contravention enables a built form response that meets the conventional aged care models for development. Specifically, the development



provides for internal accessibility and large level floor plates, suitable sight distances from centralised nursing stations and the need for a certain number of beds for operational and commercial viability. The more vertical design, as opposed to a spread out low form, also ensures facilities are operationally efficient. The combination of these specialist built form requirements generally leads to multi-storey development. When combined with the need to retain vegetation and address flooding, these factors can further increase the non-compliance as in this case. It therefore follows that the proposed contravention enables a built form that meets the needs of future occupants, is commercially viable whilst also enabling the preservation of the natural site features.

- Uniting intends to maintain continuity of aged care services on this site during the redevelopment phase, which is evidenced by the retention of 50 hostel beds during the construction period at some considerable cost; and
- The reintroduction of the Fellowship Centre on the ground floor of the proposed development will require larger floor to ceiling heights, which increases the overall building height. Uniting sees the continuation of this community service an important element of this development.

Accordingly, notwithstanding the non-compliance with the numerical standard the proposed development achieves the objectives of the standard as well as being consistent with the planning controls and thus the objection is well founded. Strict compliance in the circumstances of this case is unnecessary and unreasonable to achieve the specified objective of the standard.

5. The proposal will be in the public interest because it is consistent with the objectives of the standard and the objectives of the zone. [cl. 4.6(4)(a)(ii)]

In section 2 (above), it was demonstrated that the proposal is consistent² with the objectives of the development standard. The proposal is also consistent with the objectives of the zone as explained in Table 2 (below).

Table 2 - Consistency with Zone Objectives

Objective	Discussion
To provide for the housing needs of the community within a medium density residential environment.	The proposal provides additional housing for the local area, addressing the local market demand for seniors care housing. The breach of the standard does not result in an inconsistency with this objective.
To provide a variety of housing types within a medium density residential environment.	The breach of the standard does not result in an inconsistency with this objective. The proposed new RACF will be in the form of a three (3) storey building containing 100 beds. The seniors housing has been designed around the concept of providing 'households'. The households seek to provide a homelike environment for residents by grouping bedrooms with their own living, dining, kitchen, and laundry areas, all within a secure household environment.
To enable other land uses that provide facilities or services to meet the day to day needs of residents.	The breach of the standard does not result in an inconsistency with this objective. The proposed development incorporates a range of ancillary uses and services including a café, beauty and hair salon, multi-purpose room, chapel and fellowship centre.
To provide for a concentration of housing with access to services and facilities.	The proposal provides the concentration of housing with access to a range of ancillary services on site and within adjoining commercial development. The breach of the standard does not result in an inconsistency with this objective.
To enhance the essential character and identity of established residential areas.	The breach of the standard does not result in an inconsistency with this objective. As discussed earlier, the design largely preserves existing site characteristics such as vegetation and topography, which enhances the character of the area. The proposed built form and materials have also been chosen with care and sensitivity to the site context, ensuring a sense of 'domesticity' to the building.
To ensure that a high level of residential amenity is achieved and maintained.	The breach of the standard does not result in an inconsistency with this objective. As discussed earlier, the design largely preserves existing site

² In *Dem Gillespies v Warringah Council* [2002] LGERA 147 and *Addenbrooke Pty Ltd v Woollahra Municipal Council* [2008] NSWLEC the term 'consistent' was interpreted to mean 'compatible' or 'capable of existing together in harmony'.

	<p>characteristics such as vegetation and topography, which enhances the character of the area. The proposed built form and materials have also been chosen with care and sensitivity to the site context, ensuring a sense of 'domesticity' to the building.</p>
<p>To ensure that development reflects the desired future character and dwelling densities of the area.</p>	<p>The breach of the standard does not result in an inconsistency with this objective. The character of the area is comprised of a mixture of medium density and low density residential dwellings, institutional buildings and commercial shopping centre developments. Within this context, the proposed development is not inconsistent with the desired future character and dwelling densities of the area.</p>

As can be seen from Table 2, the proposal is consistent with the objectives of the standard and the objectives of the zone, and is therefore in the public interest.



6. Contravention of the development standard does not raise any matter of significance for State or regional environmental planning. [cl. 4.6(5)(a)]

There is no identified outcome which would be prejudicial to planning matters of state or regional significance that would result as a consequence of varying the development standard as proposed by this application.

7. There is no public benefit of maintaining the standard [cl. 4.6(5)(b)]

There is no public benefit³ in maintaining strict compliance with the development standard given that there are no unreasonable impacts that will result from the variation to the development standard and hence there are no public disadvantages. Conversely, non-compliance with the development standard would allow for the consolidation of seniors housing in a single location (rather than ad-hoc piecemeal seniors development on other R3 zoned land), whilst retaining significant views and vegetation and not having any unreasonable environmental impacts. Moreover, the proposal will provide additional seniors accommodation and care for the community in an area highly serviced by suitable retail, medical services and public transport. Therefore, the advantages of the proposal outweigh the disadvantages.

³ *Ex Gratia P/L v Dungog Council (NSWLEC 148)* established that the question that needs to be answered to establish whether there is a public benefit is “whether the public advantages of the proposed development outweigh the public disadvantages of the proposed development”